Jurisdictional Statement

No1 - 1964

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In the Supreme Court of the United States

October Term, 1981

RAYMOND B. GORRELL,

APPELLANT

VS.

DONALD P. FOWLER, and
JERRY W. FOWLER,

APPELLEES

ON APPEAL
FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Chapter 91A-61 of the Georgia Code requires that a non-resident contractor who desires to engage in the business of contracting in Georgia must register with the Georgia Commissioner of Revenue for each contract on which the total contract price or compensation to be received amounts to more than $10,000.00. The non-resident contractor is required to report to the Commissioner with respect to the tax liability of the contractor pursuant to the business including, but not limited to, liability under the Employment Security Law. The non-resident contractor is also required, before entering into the performance of the contract, to execute and file with the Commissioner a good and valid bond, conditioned that all taxes which may accrue to Georgia or to its political

subdivisions on account of the execution and performance of the contract will be paid on demand. The execution and filing of the bond is a condition precedent to commencing work on any contract in Georgia. Any contractor who fails to register with the Commissioner as required by the Chapter or to comply with any of the provisions of the Chapter shall not be entitled to maintain an action to recover payment for performance of the contract in the courts of Georgia.

The questions presented on this appeal are:

(1) Whether or not Chapter 91A-61 of the Georgia Code is violative of the Privileges and Immunities Clause of the United States Constitution insofar as it denies access to the courts of Georgia to a non-resident contractor who does not comply with the commands of the Chapter?

(2) Whether or not the application of Chapter 91A-61 of the Georgia Code is repugnant to the Commerce Clause in denying the non-resident contractor Gorrell access to the courts of Georgia?

LISTING OF ALL PARTIES

The parties are set forth in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

RAYMOND B. GORRELL,

APPELLANT

VS.

DONALD P. FOWLER, and
JERRY W. FOWLER,

APPELLEES

ON APPEAL
FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 248 Ga. 801 (1982). That opinion is set forth in Appendix A hereto. The order entered in the Superior Court of Catoosa County, Georgia, wherein the case was dismissed at the trial level was not published. A

copy of the order is set forth in Appendix B hereto.

JURISDICTION

This is an appeal from a final judgment entered pursuant to a decision of the Supreme Court of the State of Georgia wherein was drawn in question the validity of Chapter 91A-61 of the Georgia Code on the ground of its being repugnant to the Constitution of the United States. The decision of the Supreme Court of Georgia was in favor of the validity of Chapter 91A-61. In the trial court (the Superior Court of Catoosa County) and in the Supreme Court of Georgia, the Appellant drew into question the validity of Chapter 91A-61 on the ground of its repugnance to the Constitution of the United States. The judgment and opinion of the Supreme Court of Georgia was entered on January 6, 1982. The Supreme

Court of Georgia denied a timely motion for rehearing on January 27, 1982. The Notice of Appeal was filed with the Clerk of the Supreme Court of Georgia on February 24, 1982. A copy of that Notice of Appeal was filed with the Clerk of the Superior Court of Catoosa County, Georgia on February 25, 1982. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions involved are the Privileges and Immunities Clause and the Commerce Clause. The Privileges and Immunities Clause of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in

the several States.

The Commerce Clause provides that Congress shall have the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Chapter 91A-61 of the Georgia Code is set forth in full in Appendix G hereto. A pertinent portion of that Chapter is Georgia Code §91A-6107 which provides:

> No contractor who fails to register with the Commissioner as required by this Chapter or to comply with any of the provisions of this Chapter shall be entitled to maintain an action to recover payment for performance on the contract in the courts of this State.

STATEMENT OF THE CASE

Gorrell, the Appellant, instituted this action against the Fowlers, the Appellees, in the Superior Court of Catoosa County, Georgia in June of 1974

to recover against the Fowlers on a two count complaint. Gorrell sought recovery for the breach of a contract wherein, among other things, Gorrell had entered into a written agreement to construct for the Fowlers a commercial building in Fort Oglethorpe, Georgia which was to be used for a furniture business. In addition to damages, Gorrell also sought recovery in quantum meruit. The Fowlers answered and counterclaimed. The case went to trial in October of 1976. On the sixth day of trial, a jury returned a verdict for Gorrell on the contract and judgment was entered accordingly. On appeal, the Court of Appeals of Georgia reversed the judgment on the ground that the trial judge had not given correct jury instructions. Fowler v. Gorrell, 148 Ga. App. 573 (1978).

A second trial was commenced on May

12, 1980. During the course of cross examination of Gorrell on the afternoon of May 12, 1980, counsel for the Fowlers moved for dismissal on the grounds that Gorrell was a non-resident contractor who had failed to register with Georgia Commisioner of Revenue. This defense had not been previously raised by any means. The trial court, after hearing initial argument concerning the defense, directed counsel to study the matter and file briefs by noon of the next day, May 13, 1980.

On the next afternoon, the trial court heard argument on the motion and received briefs, but refused to allow introduction of any further evidence. Gorrell raised by brief and oral argument his Constitutional objections based on the Privileges and Immunities Clause, the Commerce Clause, the Due Process Clause,

and the Equal Protection Clause of the United States Constitution. The trial judge granted the motion and dismissed Gorrell's complaint.

A direct appeal by Gorrell was dismissed on the ground that the counterclaim filed by the Fowlers was still pending. 247 Ga. 67 (1981). Pursuant to the interlocutory review procedures in Georgia, the Supreme Court of Georgia did review the ruling by the trial court. In an opinion handed down on January 6, 1982, the Supreme Court of Georgia rejected all four of the federal Constitutional arguments advanced by Gorrell. Gorrell v. Fowler, 248 Ga. 801, 802-803 (1982). On this appeal, Gorrell pursues only the privileges and immunities and commerce clause issues.

Title 28 U.S.C. §2403(b) may be applicable to this case. This

Jurisdictional Statement shall be served on the Attorney General of Georgia.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. The Privileges and Immunities Issue.

This case involved the efforts by Gorrell to recover from the Fowlers for the breach of a contract entered between the parties for the construction by Gorrell of a commercial furniture building in Fort Oglethorpe, Georgia. Gorrell is and was a resident of Tennessee. However, he resides in a metropolitan area (Chattanooga, Tennessee) which is near the Georgia and Alabama state lines.

Gorrell's complaint against the Fowlers was dismissed during the presentation of his case in chief, upon motion by the Fowlers. The ground for dismissal was that Gorrell had not complied with

the commands of Chapter 91A-61 of the Georgia Code. The Supreme Court of Georgia has ruled that the unrefuted testimony in this case was to the effect that Gorrell maintained his home and office in the State of Tennessee and that all his business records and reporting requirements were conducted under the laws of the State of Tennessee. There was no evidence in the case that Gorrell had failed to pay any required tax imposed by either the State of Tennessee or the State of Georgia.

This Court has interpreted the Privileges and Immunities Clause to prevent a State from imposing unreasonable burdens upon citizens of other States in their pursuit of common callings within the State. Ward v. Maryland, 12 Wall 418, 20 L.Ed 449 (1871). The Court has also viewed the right of access to the

courts of a State and the right to dispose of privately held property to be fundamental rights coming within the scope of the Privileges and Immunities Clause. Canadian Northern R. Co. v. Eggen, 252 U.S. 553, 64 L.Ed 713 (1920); Blake v. McClung, 172 U.S. 239, 43 L.Ed 432 (1898). State tax distinctions based on residence are viewed with heightened concern by this Court; a more rigorous standard of review is applied to state tax distinctions based on residence than is applied when distinctions are created amongst business organizations. Austin v. New Hampshire, 420 U.S. 656, 663, 43 L.Ed 2d 530, 536 (1975).

Based on the standard erected by Austin v. New Hampshire, supra, the constitutionality of Georgia Code Chapter 91A-61 cannot be sustained under the scrutiny of the Privileges and Immunities

Clause. There is no dispute in this case that the burden of this regulatory scheme falls exclusively upon non-residents. There is no provision in the Georgia Code which would deny a resident of Georgia access to the courts of Georgia whether or not they comply with the Georgia Employment Security Law. Non-resident contractors are not able to pursue the business of contracting within the State of Georgia upon the same terms and conditions as are resident contractors. The penalty imposed upon a non-resident contractor is clear and unconstitutionlly harsh. The non-resident contractor who does not comply with the commands of Chapter 91A-61 before commencing performance of his contract is, under the terms of the statutory scheme, forever barred from pursuing a claim on the contract in the courts of Georgia. Gorrell contends

his fundamental right to pursue a calling and his fundamental right of access to the courts have been denied. The regulatory scheme of Chapter 91A-61 is violative of the Privileges and Immunities Clause of the Constitution of the United States.

2. Commerce Clause Issue.

A second question presented on this appeal which is substantial is whether or not the applicaion of Code §91A-61 is an undue burden on interstate commerce. Under the controlling decisions of this Court, there is such an undue burden.

The interstate flavor of the activity in this case can be seen from the negotiation and execution of the contract in question, the flow of materials that were utilized in the construction of the building, the travel of the workers that were utilized in the construction of the

building, and the ultimate use to which the building was put.

Gorrell, a resident of Tennessee, entered into the contract to construct a building which was to be used by the Fowlers as a furniture store. Negotiations for the contract took place in both Georgia and Tennessee. (T. 149). The contract was executed in Chattanooga, Tennessee. (T. 149).

The steel used in the construction of the building came from Tennessee, Georgia, Alabama, and Texas. The steel coming from outside the State of Georgia was shipped on trucks into Georgia. (T. 150). On two occasions during construction of the building, Gorrell traveled to Texas in connection with the erection of the building. (T. 150). Concrete used in the construction came from Chattanooga, Tennessee and traveled across the state line into Georgia for

use in the building. (T. 150). The air conditioning supplies, the plumbing supplies, the electrical supplies, and some of the fill used in the construction of the building came from outside of Georgia. (T. 150).

The majority of the employees that worked on the building lived in Tennessee, though some of them lived in Georgia. (T. 153). Thus, most of the employees, as well as Gorrell, crossed state lines in connection with the construction of the building.

The building erected was between one and two miles from the Tennessee line. (T. 152). The Fowlers conducted business in Rome, Georgia, Fort Oglethorpe, Georgia, and Chattanooga, Tennessee. (T. 152). The furniture store which was located in the structure after completion advertised on radio and television

stations in both Georgia and Tennessee. (T. 151). The customers of the store come from Tennessee, Alabama, and Georgia. (T. 152).

The interstate character of the activities in connection with the execution of the contract, the performance of the contract and the business carried on in the building after construction are clear. The contract arose and was performed in the flow of interstate commerce.

The contract in question was negotiated in the flow of interstate commerce, and the building (which was the subject matter of the contract) was erected in the flow of interstate commerce, and the use to which the building was put is in the flow of interstate commerce. Accordingly, the refusal of the Georgia courts to permit Gorrell to go into court

to enforce his contract is an undue burden on interstate commerce and so is repugnant to the Commerce Clause. Allenberg Cotton Co., Inc.v. Pittman, 419 U.S. 20, 42 L.Ed 2d 195 (1974); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 66 L.Ed. 239 (1921); Diversacon Industries, Inc. v. National Bank of Commerce, 629 F.2d 1030 (5th Cir. 1980).

CONCLUSION

The issues in this case touch upon the fundamental rights of an individual to pursue a trade or calling and to obtain redress for grievances in the courts. This case further touches upon the structural balance which must exist in the concept of federalism and the extent to which a state can erect barriers to the free flow of commerce amongst the states. Gorrell contends the

challenged portion of the Georgia Code is violative of the Privileges and Immunities Clause and that application of the challanged portion is repugnant to the Commerce Clause. Accordingly, probable jurisdiction should be noted.

Respectfully submitted,

J. MICHAEL LAMBERTH
Counsel for Appellant

[APPENDICES FOLLOW]

Appendix

APPENDIX A

OPINION OF THE SUPREME COURT OF GEORGIA

37757. GORRELL v. FOWLER et al.

Weltner, Justice.

Application for interlocutory review was granted on the motion of Gorrell, a contractor, protesting the dismissal of his complaint against the Fowlers by the Superior Court of Catoosa County.

In 1972, Gorrell entered into a contract with the Fowlers whereby Gorrell agreed to do certain construction work. A dispute ensured, and Gorrell filed a complaint which ultimately went to jury trial. During the course of the trial, the Fowlers moved that his complaint be dismissed under the provisions of Ga.L. 1961, p. 480 et seq., presently codified as Code §91A-6107, providing as follows: "No contractor who fails to register with the commissioner as required by this

Chapter or to comply with any of the provisions of this Chapter shall be entitled to maintain an action to recover payment for performance on the contract in the courts of this State." The statute as presently codified is identical to that in force on the date of the original contract and the institution of the present action.

The trial court heard testimony from Gorrell to the effect that he resided in the State of Tennessee; that his contracting business was located in the State of Tennessee; that he was licensed by the authorities of the State of Tennessee; that he had not registered with the Georgia authorities as required by the aforesaid Act. The trial judge thereafter granted the Fowlers' motion to dismiss based upon Gorrell's failure to comply with Code Chapter 92-4, et seq.,

(now repealed) and issued a certificate of immediate review.

Gorrell raises several substantive points in his enumeration of errors, which we will treat seriatim.

1. Gorrell contends that the trial court erred in permitting the Fowlers to assert a defense under Code Chapter 91A-61, when that defense was not specially pleaded, and was first raised during the trial of the case. The Civil Practice Act (Code Ann. Title 81A) sets forth a limited number of defenses which must be pleaded specially, including capacity. Code Ann. §81A-109(a). We will not extend, by implication, the requirements of the Civil Practice Act, thereby beginning the long trek backward into the labyrinth of common law pleading, from which we have so recently escaped. See Code Ann. §81A-101. The defense was properly raised.

2. Gorrell contends that Code §91A-6107 is inapplicable to an action in quantum meruit. A simple reference to the language of the statute is sufficient to dispose of this enumeration. In no way could we interpret the language "no contractor . . . shall be entitled to maintain an action to recover payment for performance on the contract. . . ." in so restrictive a manner. This enumeration is without merit.

3. Gorrell contends that the trial court erred in refusing to submit to the jury the question whether he was a non-resident within the meaning of the applicable code section. Gorrell stated under oath that he maintained his home and office in the State of Tennessee and that all of his business records and reporting requirements were conducted under the laws of the State of Tennessee.

Under this evidence, the trial court correctly made the factual determination as to non-residency, and no jury issue was raised by the evidence. Code Ann. §81A-150(a); Top Quality Homes v. Jackson, 231 Ga. 844 (204 SE2d 600) (1974).

4. Appellant contends that the trial court denied him the opportunity to introduce further evidence relative to his non-residency, in an effort to mitigate testimony, outlined above, given on the prior day, on the ground that to do so would be to impeach his own testimony. Obviously, a party may not offer evidence to impeach his own witness absent surprise or entrapment. Code Ann. §38-1801. The trial court has discretion in this matter, and his determination that such testimony would be impeaching is no abuse of that discretion. This enumeration is without merit.

5. Gorrell contends that the Georgia statute is unconstitutional as violative of the United States and the Georgia Constitutions in five particulars. However, the constitutional objections raised in the trial were, with one exception, mere conclusions, without in any way setting forth the particularities of any alleged fatality. "One who calls in question the constitutionality of law must in his pleadings distinctly and clearly point out in what respect the law is violative of the Constitution. Laffitte v. Burke, 113 Ga. 1000 (39 SE 433); Scott v. State, 187 Ga. 702(4) (2SE2d 65)." Haber v. Fulton County, 124 Ga. App. 789, 791 (186 SE2d 152) (1971). Notwithstanding, we have reviewed the statute and find that it is not unconstitutional under any of Gorrell's theories. The appellate courts of our state have

upheld similar disabilities relative to non-residents falling in different categories, such as foreign corporations (Code Ann. §22-1421(b); Metric Steel Co. v. BLI Const. Co., 147 Ga. App. 380 (249 SE2d 121) (1978); National Heritage Corp. v. Mount Olive Memorial Gardens, 244 Ga. 240 (260 SE2d 1) (1979)), and real estate brokers (Code Ann. §84-1404(a); Northside Realty Assoc. v. MPI Corp., 245 Ga. 321 (265 SE2d 11) (1980); Keenan Co. v. Pamlico, Inc., 245 Ga. 842 (268 SE2d 334) (1980)).

The non-resident contractor statute applies only to contracts in excess of $10,000 which are to be performed within this state. The registration fee is but $10.00, the principal purpose of the statute being to require that a bond be posted to insure payment of unemployment contributions which are the

responsibility of the contractor. Manifestly, the Act is not designed to discriminate against non-resident contractors, but to bring them into a parity with resident contractors relative to the compliance with an important obligation under the Georgia Employment Security Law.

In striking down an Alaska statute which required non-residents to pay ten times more for a commercial fishing license than residents, the United States Supreme Court state that "[l]ike many other constitutional provisions, the privileges and immunities clause is not absolute. It does bar discrimination agianst citizens of other States where thereis no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of

Treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." Toomer v. Witsell, 334 U.S. 385, 396 (68 SC 1156, 92 LE 1460) (1948); see Canadian Norther R. Co. v. Eggen, 252 U.S. 553 (40 SC 402, 64 LE 713) (1920); Ownbey v. Morgan, 256 U.S. 94 (41 SC 433, 65 LE 837) (1921); Hawes v. Club Ecuestre El Comandante, 535 F2d 140 (1st Cir. 1976); Brewster v. North Am. Van Lines, 461 F2d 649 (7th Cir. 1972); see also DeKalb Cablevision Corp. v. Press Assn.,

Inc., 141 Ga. App. 1 (232 SE2d 353) (1977); Winston Corp. v. Park Electric Co., 126 Ga. App. 489 (191 SE2d 340) (1972).

These enumerations are without merit.

6. Gorrell contends that the Act is violative of his "right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both." 1976 Ga. Const., Art. I, Sec. I, Par. IX; Code Ann.§2-109. This enumeration is without merit, as the same attack might logically lie against innumerable provisions of law (such as the Statute of Limitations) which define the rights of litigants.

7. The other enumerations of error, including those relative to waiver and estoppel, are without merit.

Accordingly, the judgment of the trial court must be affirmed.

JUDGMENT AFFIRMED. All the Justices concur, except Jordan, C.J., and Smith, J., who dissent.

Decided January 6, 1982
Rehearing Denied January 27, 1982.

APPENDIX B

ORDER OF SUPERIOR COURT OF CATOOSA COUNTY DISMISSING COMPLAINT

SUPERIOR COURT FOR COUNTY
OF CATOOSA STATE OF GEORGIA

RAYMOND B. GORRELL
d/b/a GORRELL
CONTRACTING CO.

VS.

CIVIL ACTION
FILE NO. 5946

DONALD FOWLER, et al.

ORDER OF
DISMISSAL

Defendant having moved in Open Court for dismissal of Plaintiff's Complaint for failure to comply with Chapter 92-4 et seq Ga. Code, and upon consideration of the record and argument of Counsel, said Motion is GRANTED, and said Complaint stands dismissed. Dated this 13th day of May 1980.

/s/ Paul W. Painter
Judge

Entered: May 13, 1980

APPENDIX C

JUDGMENT OF SUPREME COURT OF GEORGIA
CASE NO. 37757

Atlanta, January 6, 1982

The Honorable Supreme Court met pursuant to adjournment. The Following judgment was rendered:

RAYMOND B. GORRELL, d/b/a GORRELL CONSTRUCTION COMPANY v. DONALD P. FOWLER ET AL

This case came before this court upon an appeal from theSuperior Court of Catoosa County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Jordan, C.J. and Smith, J., dissent.

Entered: January 6, 1982

APPENDIX D

ORDER OF SUPREME COURT DENYING MOTION FOR REHEARING

CASE NO. 37757

The Motion for Rehearing was denied today: Case No. 37757 Gorrell d/b/a Gorrell Const. Co. v. Fowler et al. Jordan, C.J. and Smith, J. dissent.

Yours very truly,
/s/
Mrs. Joline B. Williams,
Clerk

Entered: January 27, 1982

APPENDIX E

NOTICE OF APPEAL

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

RAYMOND B. GORRELL, d/b/a GORRELL CONTRACTING COMPANY	:	
Appellant	:	
VS.	:	CASE NO. 37757
DONALD P. FOWLER and JERRY W. FOWLER	:	
Appellees	:	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Raymond B. Gorrell, d/b/a Gorrell Contracting Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Georgia which judgment was entered in this case on January 6, 1982.

A timely MOTION FOR HEARING was denied by the Supreme Court of Georgia on January 27, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

The clerk will please retain the record, including the transcript, for transmission to the Clerk of the Supreme Court of the United States at the appropriate time.

This 24th day of February, 1982.

COTTON, WHITE & PALMER, P.A.
Attorneys for Appellant
Raymond B. Gorrell, d/b/a
Gorrell Contracting Company

By /s/
J. MICHAEL LAMBERTH

46 Fifth Street, N.E.
Atlanta, Ga. 30365
404/892-3400

Received By Hand Delivery
and Filed with the Clerk,
Supreme Court of Georgia:
February 24, 1982

Also Filed on February 25,
1982 with the Clerk of
Superior Court of Catoosa
County, Georgia.

PROOF OF SERVICE

I, J. MICHAEL LAMBERTH, an attorney in the office of Cotton, White & Palmer, P.A., attorneys of record for Raymond B. Gorrell, d/b/a Gorrell Contracting Company, appellant herein, depose and say that on the 24th day of February, 1982, I am a member of the Bar of the U.S. Supreme Court and in compliance with Rule 28 served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Donald P. Fowler and Jerry W. Gowler, appellees herein, by depositing a copy of the same in the United States mail, with first class postage pre-paid, addressed to counsel of record for theFowlers as follows:

Frank M. Gleason, Esq.
102 Howard St.
Rossville, Ga. 30741

Dated this 24th day of February, 1982.

/s/
J. MICHAEL LAMBERTH

Subscribed and sworn to before me at Atlanta, Georgia this 24th day of February, 1982.

/s/ Susan B. Nest
Notary Public

APPENDIX F

LEGISLATIVE INTENT

The statutes in question in this case were enacted by the General Assembly of Georgia in 1961 as Acts 1961, pg. 480, et seq., effective July 1, 1961. The statutes appeared in the Georgia Code as Ga. Code Chapter 92-4. The statutes presently appear in the Georgia Code as Chapter 91A-61 by virtue of Acts 1978, pp. 309, 735, effective January 1, 1980.

The Preamble to the 1961 Act reads as follows:

> An Act to insure the collection of taxes from nonresidents engaging in the business of contracting in this State; to provide for the registration of nonresident contractors as defined herein; to provide for the filing of a bond and a consent to service of process; to provide penalization for the violation of this Act; to provide an effective date; to repeal conflicting laws; and for other purposes.

APPENDIX G

CHAPTER 91A-61 OF THE GEORGIA CODE

91A-6101. "Contractor" defined. For the purposes of this Chapter, "contractor" means any person engaged in the business of constructing, altering, repairing, dismantling, or demolishing buildings, roads, bridges, viaducts, sewers, water and gas mains, streets, disposal plants, water filters, tanks and towers, airports, dams, water wells, pipelines, and every other type of structure, project, development, or improvement coming within the definition of real property or personal property including, but not limited to, constructing, altering, or repairing of property to be held either for sale or rental and all subcontractors so engaged.

91A-6102. Purpose of Chapter:

registration of nonresident contractors; fees: exemptions. Each nonresident contractor desiring to engage in the business of contracting in this State shall register with the Commissioner for each contract when the total contract price or compensation to be received amounts to more than $10,000 and shall report to the Commissioner, as provided by rule, with respect to the tax liability of the contractor pursuant to the business including, but not limited to, liability under the Employment Security Law. The Commissioner shall charge a fee for the registration in the amount of $10 for each contract. All fees received by the Commissioner shall be deposited on Monday of each week with the Fiscal Division.

91A-6103. Bonds. (a) Before

entering into the performance of any contract the total price of which, or the total compensation to be received by the contractor from which, amounts to more than $10,000, the contractor shall execute and file with the Commissioner a good and valid bond in a surety company authorized to do business in this State, or with sufficient sureties to be approved by the Commissioner, conditioned that all taxes which may accrue to the State and to the political subdivisions of the State on account of the execution and performance of the contract will be paid on demand including, but not limited to, contributions due under the Employment Security Law.

(b) The execution and filing of the bond required by subsection (a) shall be a condition precedent to commencing work on any contract in this State.

(c) (1) Every bond required by this Section shall be in an amount equal to 10 percent of the contract price or of the compensation to be received by the contractor pursuant to the contract.

(2) (A) The Commissioner may permit or require a contractor to file a blanket or master bond, conditioned as provided in subsection (a), in a sum determined proper by the Commissioner when:

(i) The contractor is engaged in a continuing service under multiple contracts or is performing under a contract on a contingent or unit bases and the contract price or compensation cannot be determined until after the performance of the contract.

(ii) The Commissioner finds that registration of a contract before commencement of work under the contract is impracticable for any reason.

(B) No bond pursuant to this paragraph shall be in an amount less than $10,000 with respect to all contracts to be performed during the current calendar year.

(C) On or before March 1 in each year, the contractor shall report and register all contracts of $10,000 or more completed during the previous calendar year and shall pay the registration fee of $10 for each contract.

91A-6104. Injunction upon failure to register or make bond. Each person failing to register as required by this

Chapter or failing to execute the required bond before beginning the performance of any contract shall be denied the right to perform the contract until he complies with registration and bond requirements. The county attorney of any county in which the contract is to be performed, the general counsel of the employment Security Division when requested by the director of the Employment Security Division, or the attorney for the Commissioner when requested by the Commissioner may proceed by injunction to prevent any activity in the performance of the contract until the registration is made and the bond is executed and filed. A temporary injunction enjoining the execution of any such contract shall be granted without notice by any judge authorized by law to grant injunctions.

91A-6105. Appointment of Secretary of State as agent for service. At the time a contractor registers with the Commissioner, the contractor shall make an appointment, in writing, of the Secretary of State of the State, or his successor in office, to be his true and lawful agent upon whom may be served all lawful process in any action or proceeding against the nonresident contractor for State and local taxes growing out of any contract executed, or being executed, in this State. The appointment shall be evidence of the contractor's agreement that any such process against him which is served on the Secretary of State shall be of the same legal force and validity as if served upon him personally within the State.

91A-6106. Actions; service; venue; record kept by Secretary of State. An action against any contractor coming within the provisions of this Chapter may be brought in Fulton County or in any county in which any work under any contract is performed by the attorney for the Commissioner or the general counsel of the Employment Security Division. The summons shall be directed to the Secretary of State and shall require the defendant to answer by a certain day, not less than 30 days nor more than 60 days from the date of the issuance of the summons. The summons shall be forwarded immediately by the clerk of the court to the Secretary of State who shall immediately forward a copy of the summons to the contractor at the address given by the contractor. After forwarding the summons, the

Secretary of State shall make return of the summons to the court in which the summons was issued. The return shall show the date of receipt of the summons by the Secretary of State, the date of forwarding the copy of the summons, and the name and address of the person to whom the Secretary of State forwarded the copy of the summons. The retrun shall be under the hand and seal of the office of the Secretary of State and shall have the same forece and effect as a due and sufficient return made by the sheriff on process directed to him. The Secretary of State shall keep a suitable record book in which he shall docket every action commenced as provided in this Section against any contractor. This record shall show the court in which the suit is brought, the title of the case, the time when the suit is

commencecd, and the date and manner of service.

91A-6107. Failure to register precludes right to sue. No contractor who fails to register with the Commissioner as required by this Chapter or to comply with any of the provisions of this Chapter shall be entitled to maintain an action to recover payment for performance on the contract in the courts of this State.

91A-6108. Release of bonds. No bond required under this Chapter shall be released until the contract for which the bond is given has been fully performed and until the Commissioner obtains a written release from the director of the employment Security Division certifying that all contributions and interest due by the principal

on the bond under the Employment Security Law have been paid in full. Bonds shall be released automatically two years after written notification of the completion of the contract is received by the Commissioner unless a court proceeding has been instituted against the contractor.

Motion to Dismiss or Affirm

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NO. 81-1964

IN THE

Supreme Court of the United States

October Term, 1981

RAYMOND B. GORRELL,

Appellant,

–VERSUS–

DONALD P. FOWLER and
JERRY W. FOWLER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

MOTION TO DISMISS

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[Georgia Laws 1961, pages 480 et seq.]

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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MOTION TO DISMISS

NOW COME Appellees, pursuant to the provisions of Rule 16 of the Rules of the Supreme Court of the United States, and move the Court to dismiss the appeal herein on the ground that said appeal does not present a substantial federal question.

STATEMENT OF THE CASE

This action began on June 8, 1974, when Appellant, RAYMOND B. GORRELL, filed suit against Appellees, JERRY and DON FOWLER, together with their wives, Jerilyn B. and Linda G. Fowler, in the Superior Court for Catoosa County, Georgia. R-4 to 15. The complaint arose out of a dispute concerning a construction contract entered in 1972, by which GORRELL undertook to construct a building for the FOWLERS in Fort Oglethorpe, Georgia. GORRELL sought to recover damages from the FOWLERS resulting from the dismissal of GORRELL from the project prior to completion, and for alleged extra work outside the contract. The FOWLERS filed counterclaims for damages occasioned by alleged breaches of the contract by GORRELL, leading to his dismissal.

Prior to this appeal, this action has proceeded through appellate courts on several occasions, which accounts in part for the age of the case.

This appeal arises from the dismissal of the complaint by the trial court, because of the failure of appellant, GORRELL, to comply with the registration requirements imposed upon nonresident contractors under the provisions of Ga. Laws 1961, pages 480 et seq., presently codified as Georgia Code Annotated §§91A-6101 et seq., which provide that the failure to so register will preclude the right to sue upon the contract in the Courts of Georgia. The Supreme Court of Georgia affirmed the dismissal of the action by the trial court. Gorrell v. Fowler, 248 Ga. 801 (1982). A copy of such opinion is attached to Appellant's Jurisdictional Statement.

ARGUMENT

The provisions of Ga. Laws 1961, pp. 480 et seq., presently codified as Ga. Code Ann. §§91A-6101 et seq., require contractors, not residents of Georgia, engaged in substantial building projects within the State of Georgia

[of a value in excess of $10,000.00], to register with the Georgia Revenue Commissioner, pay a $10 registration fee, file a bond to ensure the payment of taxes, and nominate the Secretary of State as an agent to receive service of process. Failure to comply with the requirements of the statute precludes suit on the contract in the Courts of Georgia.

Upon testimony by Appellant, that he was a nonresident contractor, that he had engaged in many construction projects in the State of Georgia, that the present contract was in excess of $10,000.00, but that he had failed to register with the Georgia Revenue Commissioner [T-81,82,100,101], the trial court granted the motion of Appellees to dismiss the complaint in accordance with the provisions of Georgia Laws 1961, pp. 480, et seq.

In affirming the decision of the trial court, the Supreme Court of Georgia rejected

Appellant's contentions that the statutory registration requirements had been either improperly pleaded, or had been waived, or were unconstitutional. In this Court Appellant presses two of his constitutional arguments, those based respectively on the Commerce Clause and the Privileges and Immunities Clause of the Constitution of the United States.

One of the leading modern cases interpreting the Privileges and Immunities Clause contained in Article IV of the Federal Constitution is Toomer v. Witsell, 334 U.S. 385 (1948). In that decision, Chief Justice Vinson stated that:

> "Like many other constitutional provisions, the Privileges and Immunities Clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for the

> discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independant reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard to the principal that the states should have considerable lee-way in analyzing local evils and in prescribing appropriate cures." Toomer v. Witsell, 334 U.S. 385,396.

The Georgia nonresident contractor qualification statute is not discriminatory. Contractors who are residents of Georgia are of course

subject to her taxing jurisdiction, to service of process within the State, and to a number of other incidents of doing business, such as the inspection of payroll records by state authorities to monitor compliance with taxation laws. The registration and bond requirements of the nonresident contractor statute place the nonresident contractor in as nearly as practicable the same position as a resident. See the discussion of the subject by Justice Rehnquist in his dissenting opinion in Allenberg Cotton Company, Inc. v. Pittman, 419 U.S. 20, 40-42 (1974). As noted by Justice Rehnquist in his Allenberg dissent, it is clear from the past decisions of the Court that the focus of inquiry is not upon the sanction imposed for failing to register, but upon the burden imposed by the requirements of the statute.

The burden imposed by the Georgia statute in question is merely a $10 registration fee,

together with a bond to ensure payment of taxes, which requirements are imposed only in connection with construction contracts within the State of a value in excess of $10,000.00. Where a foreign contractor has failed to register or qualify to do business in violation of the requirements of a corporation code or a statute such as the Georgia nonresident contractors statute, then in that event "the discrimination of which he complains could arise only from his own neglect." Canadian Northern Railway Company v. Eggen, 252 U.S. 553,561 (1920).

In the case of Union Brokerage Company v. Jensen, 322 U.S. 202 (1944), the Court held that:

> "Nor does [the Commerce Clause] preclude a state from giving needful protection to its citizens in the course of their contracts with businesses conducted by outsiders

> when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration." 322 U.S. at 212.

The Court in the Union Brokerage case went on to hold that a fee of $50 imposed on foreign corporations in connection with a certificate of authority to do business, is sufficiently small to fairly represent the cost of governmental supervision of foreign business enterprises, and that such a registration fee, no larger in amount than is reasonably required to defray the expense of administering the regulation, may be demanded in consonance with the Commerce Clause. The Court therefore concluded that the $50 license fee requirement for foreign corporations imposed by the State of Minnesota

offended neither federal legislation nor the Commerce Clause, and that the trial court was correct in dismissing the suit for a failure of the plaintiff to comply with such requirement.

It is well-settled that a state may require, in harmony with the Commerce Clause, a foreign entity to qualify within the State concerning intrastate activities. Eli Lilly & Company v. Sav-On-Drugs, Inc., 366 U.S. 276,279 (1961).

It is equally well-settled that the construction of buildings is purely a local activity, despite Appellant's argument that some of the materials used came from other states. In Browning v. City of Waycross, 233 U.S. 16 (1914), a lightning-rod installer in Waycross, Georgia was charged with failing to pay a municipal license fee required by ordinance. Mr. Browning, the installer, argued that since

the lightning rods came into Georgia in interstate commerce, the ordinance was an undue burden on such commerce in violation of the Commerce Clause. Chief Justice White, in affirming the decision of the Court of Appeals of Georgia, disposed of such contention as follows:

> "It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted

> were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be interstate commerce." 233 U.S. at 23.

CONCLUSION

The issues raised in this appeal having been resolved by previous decisions of this Court, Appellees move that the appeal herein be dismissed on the ground that said appeal

does not present a substantial federal question.

Respectfully submitted,

FRANK M. GLEASON
Attorney for Appellees